R Rajasingam v Balwant Singh Purba

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–241–95
SITI NORMA YAAKOB, VC GEORGE JJCA AND MOKHTAR SIDIN J
21 MAY 1996

Civil Procedure *— Want of prosecution — Striking out — Delay in filing summons for direction — Court file relating to matter lost — Plaintiff took 1½ years to reconstruct file — Plaintiff filed affidavit verifying list of documents six months after hearing of summons for directions — Defendant failed to file affidavit verifying documents within stipulated time as well — Whether plaintiff's delay amounted to inordinate and inexcusable delay in prosecution of action — Whether action should be strike out for want of prosecution*

On 27 April 1994, the defendant in the lower court made an application to strike out the plaintiff's writ of summons, which was filed on 17 December 1986, for want of prosecution on the ground that there was inordinate delay on the part of the plaintiff to proceed with the action (see [1996] 4 MLJ 404). The defendant alleged that the plaintiff had failed to give notice of intention to proceed after more than two years since he filed his summons in chambers to strike out certain paragraphs of the defendant's defence. The defendant further alleged that the plaintiff had only filed his summons for directions on 17 May 1989, and that it took another four years before the summons was heard. The defendant said that after the hearing, the plaintiff did not file his affidavit verifying the list of documents within the prescribed 14 days, but only some 6½ months later, and was thus in breach of the order for directions. In reply, the plaintiff stated that the delay with regard to the summons for direction was not his or his solicitor's fault because the court file relating to this matter was lost and the action could not proceeded with further until the file was reconstructed. As to the delay in filing the list of documents and the affidavit verifying the list of documents, the plaintiff argued that the defendant himself had breached the order for directions in that the defendant also did not file his list of documents and his affidavit verifying the documents within the stipulated time. In turn, the defendant stated that he was not informed that the court's file was missing, and that it was reconstructed. The judicial commissioner found that although there was delay on the part of the plaintiff before the reconstruction of the file, the delay had been explained by the plaintiff. The judicial commissioner expressed the view that the defendant was also to be blamed for the delay in that the defendant did not take early action to strike out the plaintiff's action. The defendant appealed to the Court of Appeal.

Held, allowing the appeal:

(1) There was inordinate delay on the part of the defendant and his solicitor for taking 1½ years to reconstruct the file which had less than 40 normal pages. No reasonable excuse had been given by the defendant or his solicitor for this delay (see p 554C–E).

(2) It was clear that the plaintiff was not involved at all in the reconstruction of the file. Thus, no blame was to be attached to the plaintiff or his solicitor (see p 554B).

(3) It was trite that the conduct of the matter was with the plaintiff and that the defendant was entitled at any stage to apply to the court to strike out the plaintiff's action for want of prosecution. The delay in doing so should not be held against the defendant (see p 554H).

(4) It was clear that the onus was on the plaintiff to justify the delay when the delay had been proved (see p 555E); *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 followed.

(5) In the present case, there was a delay of more than six years before the affidavit verifying documents was filed followed by the further delay by the plaintiff when the plaintiff failed to file the necessary papers in time. Those delays have the cumulative effect of inordinate and inexcusable delay which had the effect that the defendant had been prejudiced. It was clear that the plaintiff was in breach of the rules and that defendant was entitled to have the plaintiff's action struck out (see p 556B–D); *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 followed.

[Bahasa Malaysia summary

Pada 27 April 1994, defendan di mahkamah di bawah telah membuat satu permohonan untuk membatalkan writ saman plaintif, yang difailkan pada 17 Disember 1986, atas ketiadaan pendakwaan kerana terdapat kelewatan yang terlampau pada pihak plaintif dalam meneruskan tindakan (lihat [1996] 4 MLJ 404). Defendan mengatakan bahawa plaintif telah gagal memberi notis tujuan menerus selepas lebih daripada dua tahun sejak dia memfailkan saman dalam kamar untuk membatalkan perenggan tertentu dalam pembelaan defendan. Defendan selanjutnya mengatakan bahawa plaintif hanya telah memfail saman untuk arahan pada 17 Mei 1989, dan selepas itu ia mengambil masa empat tahun lagi sebelum saman tersbeut dibicarakan. Defendan menyatakan bahawa selepas pembicaraan, plaintif tidak memfailkan afidavitnya untuk menentu-sah senarai dokumen dalam tempoh 14 hari yang ditetapkan, tetapi hanya kira-kira 6½ bulan kemudian dan dengan itu telah melanggar perintah untuk arahan. Sebagai jawapan, plaintif menyatakan bahawa kelewatan berkenaan saman untuk arahan bukanlah kesalahannya atau peguamcaranya sebab fail mahkamah berhubung dengan perkara ini telah hilang dan tindakan tidak dapat diteruskan selanjutnya sehingga

A ia dibina semula. Berkenaan dengan kelewatan dalam pemfailan senarai dokumen dan afidavit yang menentu-sah senarai dokumen pula, plaintif berhujah bahawa defendan sendiri telah melanggar perintah untuk arahan kerana defendan juga tidak memfail senarai dokumen dan afidavit yang menentu-sah dokumen dalam tempoh masa disyaratkan. Defendan pula menyatakan bahawa dia tidak B diberitahu bahawa fail mahkamah telah hilang, dan bahawa fail telah dibina semula. Pesuruhjaya kehakiman mendapati bahawa meskipun terdapat kelewatan pada pihak plaintif sebelum binaan semula fail itu, kelewatan telah dijelaskan oleh plaintif. Pesuruhjaya kehakiman berpandangan bahawa defendan juga harus dipersalahkan atas C kelewatan kerana dia tidak mengambil langkah lebih awal untuk membatalkan tindakan plaintif. Defendan merayu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu:

D (1) Terdapat kelewatan yang terlampau pada pihak defendan dan peguamcaranya dalam mengambil masa 1½ tahun untuk membina semula fail yang mempunyai kurang daripada 40 muka surat biasa. Tiada penjelasan yang munasabah telah diberikan oleh defendan atau peguamcaranya atas kelewatan itu (lihat ms 554C–E).

E (2) Adalah jelas bahawa plaintif tidak terlibat sama sekali dalam binaan semula fail itu. Oleh itu, plaintif atau peguamcaranya tidak patut dipersalahkan (lihat ms 554B).

(3) Adalah mantap bahawa pengendalian perkara itu adalah dengan plaintif dan defendan berhak pada mana-mana tahap memohon F kepada mahkamah supaya tindakan plaintif dibatalkan atas ketiadaan pendakwaan. Kelewatan dalam berbuat demikian tidak harus diambil kira terhadap defendan (lihat ms 554H).

(4) Adalah jelas bahawa beban terletak pada plaintif untuk memberi justifikasi kepada kelewatan apabila kelewatan telah pun G dibuktikan (lihat ms 555E); *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 diikut.

(5) Dalam kes ini, terdapat kelewatan selama lebih enam tahun sebelum afidavit yang menentu-sah dokumen difailkan, dan ini disusuli oleh kelewatan lanjut oleh plaintif apabila plaintif tidak H sempat memfailkan kertas yang perlu. Kelewatan begitu mempunyai kesan kumulatif kelewatan terlampau dan tidak boleh diterima, yang memudaratkan defendan. Adalah jelas bahawa plaintiff telah melanggar kaedah-kaedah dan bahawa defendan berhak membatalkan tindakan plaintif (lihat ms 556B–D); *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 diikut.]

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[*Editorial Note*: The plaintiff/respondent has applied for leave to appeal to the Federal Court vide Civil Appeal No P–02–241–95.]

Notes

For cases on want of prosecution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3643–3656.

Cases referred to

Birkett v James [1977] 2 All ER 801
Ratnam v Cumarasamy & Anor [1965] MLJ 228
Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152

Legislation referred to

Rules of the High Court O 3

Appeal from: Civil Suit No 22–81–86 (High Court, Pulau Pinang)

RR Sethu (*Rajasingam & Co*) for the defendant/appellant.
Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the plaintiff/respondent.

Cur Adv Vult

Mokhtar Sidin J (delivering the judgment of the court): This is an appeal by the appellant against the decision of the learned judicial commissioner who had conditionally ordered the dismissal of the action by the respondent. We had earlier allowed the appeal, and we now give our reasons for doing so.

In order to understand the appeal we set down the chronology of events. On 17 December 1986, the respondent filed a writ of summons against the appellant for damages and a declaration that the respondent is entitled to certain professional fees paid to the appellant on behalf and in trust for the respondent. On 24 December 1986, the appellant entered appearance. On 17 January 1987, the appellant filed his defence. On 14 January 1987, the respondent applied to cross-examine the appellant. This application was dismissed on 13 May 1987. On the same date, the respondent appealed to the Supreme Court against that decision. On 27 March 1989, the respondent withdrew his appeal. On 19 January 1987, the respondent took out summons-in-chambers to strike out certain paragraphs of the statement of defence but withdrew the summons-in-chambers on 25 May 1989. The summons for directions was filed on 17 May 1989, and this was heard on 9 September 1993. On 14 April 1994, the affidavit verifying documents was filed.

On 27 April 1994, the appellant filed an application to strike out the respondent's writ of summons for want of prosecution. The learned judicial commissioner dismissed the application on 27 March 1995.

In the affidavit in support of his application, the appellant stated that the respondent had failed to give notice of intention to proceed after more than two years after filing his summons-in-chambers to strike out certain

A paragraphs of the appellant's defence as required by O 3 of the Rules of the High Court 1980. Only then did the respondent file his summons for directions. It was alleged by the appellant that even after taking out the summons for directions the respondent did not proceed to have it heard promptly. It took another four years before the summons for directions was heard and that took place on 9 September 1993. Appellant alleged B that this amounted to undue delay on the part of the respondent to proceed with the action. Appellant alleged that this was one aspect of inordinate delay on the part of the respondent.

Another aspect of inordinate delay on the part of the respondent as stated by the appellant was that after the hearing of the summons for C directions, the respondent did not file his affidavit verifying the list of documents within the prescribed 14 days. The respondent filed his affidavit only on 14 April 1994 some 6½ months later. The respondent did not apply for an extension of time from the court to file his affidavit and thus, he was in breach of the order for directions.

D In his reply, respondent stated that as to the former delay, it was not his or his solicitor's fault because the court file relating to this matter was lost and the action could not proceeded with further until the court file was found. The court file was reconstructed when the original file could not be found. When the file was reconstructed, the summons for directions E was proceeded on. The respondent admitted the said second aspect of delay. He purported to give as an excuse that the appellant himself had not complied with the order for directions in that the appellant did not file his list of documents and his affidavit verifying the documents within the stipulated time.

F In his affidavit, appellant stated that he was not aware that the court's file was missing, and that he was not informed that the file was reconstructed and he was not consulted or asked to assist the court and the respondent in the reconstruction of the file.

In his judgment, the learned judicial commissioner found that there was delay on the part of the respondent before the reconstruction of the G file. However, the learned judicial commissioner went on to say that the delay was explained by the respondent. The learned judicial commissioner found that there was a gap between 17 May 1989 to 13 November 1989. From the evidence, it is clear that on 24 April 1989, the respondent withdrew his appeal to the Supreme Court. On 17 May 1989, the respondent H filed his summons for directions. It is clear that until 15 June 1991 when the respondent's solicitor sent a letter requesting for the hearing of the summons for directions, nothing was done to have the matter proceeded with. This was followed by several reminders, the last being 6 November 1993. Until then there was no indication that the file was missing. On 13 November 1991, the senior assistant registrar wrote to the respondent's I solicitor in response to the latter's letter dated 6 November 1991 informing him that the court's file was missing and suggesting that the solicitor reconstruct the file. The reply to this letter was dated 16 July 1993 which

was about 1½ years later when the necessary documents for the purpose of reconstruction was submitted to the registry. It is to be noted that all the time, the appellant was never informed of this. No explanation was ever given by the respondent or his solicitor why there was a delay of 1½ years for him to send the necessary documents to the senior assistant registrar for the reconstruction of the file. It is clear that the appellant was not involved at all in the reconstruction of the file. He was not asked to help in the reconstruction of the file. In our view, no blame is to be attached to the appellant or his solicitor because neither of them knew what was going on. By the same letter, the respondent's solicitor requested for the hearing of the summons for directions. In his judgment, the learned judicial commissioner stated that the appellant gave an explanation to this delay. With the greatest respect, we are of the view that it is not an explanation at all. Even if it is, we do not think it is satisfactory and reasonable and is not acceptable. As can be seen from the record of appeal, the documents involved in the reconstruction of the file has less than 40 normal pages. Particularly with there being modern technology to make copies of those documents, we fail to understand why it took 1½ years to reconstruct the file. There is no suggestion that some of the documents were missing from the respondent's file. If it is so, the respondent could easily got them from the appellant or his solicitor. No such request was ever made to the appellant or his solicitor suggesting the documents were available with the respondent all the time. As such we see no reason why it took such a long time for the respondent to file copies of those documents with the registry. In our view, there was inordinate delay on the part of the respondent and his solicitor. In our view, no reasonable excuse had been given for the delay.

As to the second delay which is the delay in filing the affidavit verifying the documents, the respondent explained that the respondent was not the only party to be blamed. The appellant was also to be blamed for not filing his affidavit. The suggestion appeared to be that when the appellant delayed filing this affidavit, he in effect was condoning or excusing the respondent in the delay. It appears that the learned judicial commissioner was persuaded with this argument.

The learned judicial commissioner expressed the view that the appellant is also to be blamed for the delay in that the appellant did not take early action to strike out the respondent's action. It is trite that the conduct of the matter was with the plaintiff/respondent and that the defendant/appellant is entitled at any stage to apply to the court to strike out the respondent's action for want of prosecution. The delay in doing should not be held against the appellant. It was also suggested that the appellant should take the initiative to take out the summons for directions when the respondent failed to do so. Be that as it may, it was also open to the appellant to apply to strike out the respondent's claim.

The striking out of an action for want of prosecution is stated in the case of *Birkett v James* [1977] 2 All ER 801 at p 805 where Lord Diplock said:

> ... I shall refer to as *Allen v McAlpine*, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC Ord 25 r 1, of the current White Book. The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. ...

This principle had been accepted in Malaysia as clearly stated in the case of *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 where it was held that:

> (1) the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (a) the plaintiffs default has been intentional and contumelious or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it;

It is clear that the onus is on the respondent to justify the delay when the delay has been proved. The relevant principle is stated in the case of *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 where the Privy Council held that to justify an extension of time for the filing of the record there must be material upon which the court could exercise its discretion, otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.

In the case of *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 the Federal Court held that the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all to this inactivity when called upon to do so by the court, were guilty of inordinate and extensible delay if not also of intentional and contemptuous conduct which entitled the court to dismiss their action for want of prosecution. At p 154, Salleh Abas FJ (as he was then) said:

> ... The delay of five years and three months in our view is by no means short. It is long enough to enable a baby to grow into a big child with ability to talk intelligently and be in a kindergarten preparatory to normal schooling. In our view such delay apart from being inordinate and inexcusable has also resulted in adverse effects on the respondent. The prejudice to him here is not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or lack of documents and non-availability of witnesses but also encompassing the psychological effect which the suit had on him for having it hung over his head for the last five years or so, (see *Biss v Lambeth*). If we take into account the totality of the

period from the commencement of the cause of action on 2 October 1951, the time span of this suit would be 28 years 10 months and 24 days. Such a lengthy period is surely too long, extending as it were more than a quarter of a century.

In the present case there is a delay of more than six years before the affidavit verifying documents was filed followed by the further delay by the respondent when the respondent failed to file the necessary papers in time. Those delays have the cumulative effect of inordinate and inexcusable delay which has the effect that the defendant/appellant had been prejudiced in the terms stated by the case of *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152. The point was made when the appellant in his affidavit stated that he is unable to trace his witnesses. This becomes more significant when the action depends on witnesses and not on documents.

It is clear to us that the respondent was in breach of the rules and in our judgment the appellant is entitled to have the respondent's action struck out. The appeal was accordingly allowed with costs and the deposit refunded to the appellant.

Order accordingly.

Reported by Isabel Liong